Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-914

IRVING BRAVER and MORTON LEHRER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAY H. TOPKIS
Attorney for Petitioners
345 Park Avenue
New York, New York
10022

Of Counsel:

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1775 K Street, N. W.
Washington, D. C. 20006

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IRVING BRAVER and MORTON LEHRER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The unreported opinion of the Court of Appeal is reproduced as Appendix A to this petition. The District Court did not issue an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1971 (Appendix B). A timely motion for rehearing and rehearing *en banc* was denied in orders entered November 24, 1971 (Appendix C). A timely application for an extension of time in which

to file this petition was granted by Mr. Justice Marshall on December 20, 1971. The time to file was extended to and including January 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a defendant in a federal criminal prosecution who raises an entrapment defense be required to assume the burden of proving that Government agents induced his crime? The Courts of Appeals are in direct and express conflict on this issue.

2. May a Court of Appeals that adopts new jury instructions on entrapment deny the benefit of the new rule to the defendant in whose case the new rule is announced?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution which provides that no person shall "be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioners Irving Braver and Morton Lehrer, certified public accountants, were convicted, after a jury trial, of bribing an IRS agent and conspiracy to commit that crime.

The government's evidence at trial consisted primarily of the testimony of Sidney Romanoff. At the time of petitioners' trial, Romanoff was awaiting sentence on a plea of guilty to a charge of conspiracy to bribe Harold Wenig, an IRS inspector. The evidence showed

that Wenig told Romanoff that the IRS was investigating petitioners' accounting firm and asked Romanoff whether he knew petitioners. When Romanoff replied that they were friends of his, Wenig indicated that information concerning the investigation of their firm was available for a price. Romanoff thereafter contacted petitioner Braver and told him of Wenig's offer.

The government presented evidence that Romanoff, on petitioners' behalf, gave Wenig $500 for certain information concerning the IRS investigation. Since the evidence at trial clearly showed that any criminal activity was initiated by Wenig—a government agent—the defense of entrapment was raised.

The trial court instructed the jury that the issue of entrapment consisted of two separate sub-issues—inducement and propensity. The court further instructed that the defendant had to prove by a preponderance of the evidence that the government induced him to commit the crime. Once inducement was shown, the court stated, the government then had to prove beyond a reasonable doubt that the defendant had a propensity to commit the crime and was not entrapped.[1] Trial counsel objected to the instruction, arguing that it im-

[1] The full instruction by the trial court was as follows:

"The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government.

That is, did the government initiate the criminal transaction? *On this issue the defendant has the burden of proof. He does not have to prove it beyond a reasonable doubt but he must prove it by a fair preponderance of the evidence.* That is, he must satisfy you that it is more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no

properly placed a burden of proof on the defendant and was confusing to the jury. The trial court overruled the objection.[2]

On appeal petitioners contended that the trial court misconstrued applicable Second Circuit decisions in adopting the jury instruction at issue. Petitioners further pointed out that this bifurcated entrapment instruction had been specifically rejected by the First Circuit in *Kadis* v. *United States*, 373 F.2d 370 (1967).

The Court of Appeals rejected petitioners' contention that the trial court's instruction did not properly state the law of the Second Circuit. The Court of Appeals stated that "it is late in the day to argue that this Court has not since approved [the charge given]. . . . [W]e believe that this Circuit has approved a defendant's burden of proof as charged in this case." (App. 5a).[3] The Court of Appeals recognized, however, that its holding was in conflict with that of other circuits. (App. 8a).

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entrapment, but if you do find such inducement then you must consider the second issue.

"The second issue is whether the defendant was ready and willing to commit the crime without persuasion. This is sometimes expressed as an issue of whether he had a propensity to commit the crime. On this issue the government has the burden of proof and it must prove it beyond a reasonable doubt. Here you must determine again the defendant's state of mind. Was he looking for an opportunity—was it propitiously the right moment to violate the law to make a payoff? Was he ready and willing to commit the crime whenever he had a good opportunity so that all the government had to do was suggest it?" (Emphasis added).

[2] Both the defense *and the government* submitted proposed entrapment instructions that did not bifurcate the defense into sub-issues, nor did it place a burden of proof on the defendant.

[3] References to "App." are to the Appendix to the petition.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Affirmance of a Bifurcated Entrapment Instruction Conflicts With Decisions in Nine Other Circuits.

The Court of Appeals concluded that an entrapment instruction which requires the defendant to prove inducement by a preponderance of the evidence and at the same time requires the government to prove propensity beyond a reasonable doubt is not "fatally defective." (App. 10a). This holding directly conflicts with decisions in at least nine other circuits.

The First Circuit, for example, specifically and clearly rejected this approach in *Kadis* v. *United States*, 373 F.2d 370 (1967). There, reviewing the development of the entrapment defense, Chief Judge Aldrich pointed out that his court had initially held in *Goria* v. *United States*, 313 F.2d 641 (1963), *cert. denied*, 379 U.S. 971 (1965), that the defendant was required "to establish inducement by a preponderance of the evidence." *Id.* at 654. But, Judge Aldrich continued, this position proved to be untenable:

> "Later, however, since it was clear that the government must show the predisposition of the defendant beyond a reasonable doubt and since we were troubled by the potential confusion introduced by requiring the jury to be instructed on two different burdens, we held that there is no burden of proof on the defendant even as to inducement. *Sagansky* v. *United States*, 1 Cir. 1966, 358 F.2d 195, cert. den. 385 U.S. 816, 87 S.Ct. 36, 17 L.Ed. 2d 55. All that we there required was that there be some evidence indicating that the defendant was induced." 373 F.2d at 373.

Even the *Sagansky* formulation proved unacceptable: the Court felt that separate consideration of inducement apart from predisposition did not further

the ends sought to be achieved by recognition of the entrapment defense. Accordingly, the First Circuit concluded:

> "We find, in sum, that consideration of inducement as a separate issue serves no useful purpose, and we believe it to be a mistake. We will no longer bifurcate entrapment into sub-issues of inducement and predisposition, but will broaden the departure initiated in *Sagansky*. Henceforth we will look, singly, at the ultimate question of entrapment. If the defendant shows, through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness." 373 F.2d at 373-374.

The Third Circuit also appears to treat entrapment as involving a single question "whether the criminal design was created by the conduct of public officers, or whether the officers merely created an opportunity which a person already disposed to commit the crime sought to exploit." *United States* v. *Moses*, 220 F.2d 166, 169 (3rd Cir. 1955). See also *United States* v. *Klosterman*, 248 F.2d 191, 194 (3rd Cir. 1957).

Recently the Fourth Circuit adopted the First Circuit's approach. In *United States* v. *DeVore*, 423 F.2d 1069 (1970), the Fourth Circuit said:

> "In *Kadis* the First Circuit correctly formulated the rule: if the defendant, through government witnesses or otherwise, shows some indication that he was corrupted by government agents, the burden of disproving entrapment will be on the prosecution." *Id.* at 1071.

The Fifth Circuit has also recently concluded that the defendant does not bear any burden of proving entrapment. Carefully distinguishing between "bur-

den of proof" and "burden of going forward," the Fifth Circuit stated in *United States* v. *Groessel*, 440 F.2d 602, 606 (1971):

> "The initial burden was on Groessel to go forward with some evidence, but more than a scintilla, that Adame or Ajzen induced him to commit the offense. *Pierce* v. *United States*, *supra*, 414 F.2d at 166. This 'burden of going forward' is not to be confused with the 'burden of proof,' sometimes referred to as the 'risk of nonpersuation.' If a defendant fails to carry the burden on the issue of entrapment forward, he is not entitled to submission of the issue to a jury. On the other hand, if the defendant introduces overwhelming evidence of entrapment, the burden of going forward shifts to the Government. If the Government then fails to carry the burden forward, the defendant, having established entrapment as a matter of law, is entitled to a judgment of acquittal. The 'burden of proof' with respect to entrapment, however, is always on the Government; it never shifts. *See*, C. Wright, Federal Practice and Procedure, § 403, at 70-73 (1969)."

The Courts of Appeals for the Sixth and Eighth Circuits approve instructions treating entrapment as a single-element issue.[4] The Tenth Circuit apparently

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[4] In *United States* v. *Curtis*, 430 F.2d 1159 (6th Cir. 1970), the Court approved the following charge:

> "[W]here a person has no previous intent, or no previous purpose to violate the law, but he is induced or persuaded by a law enforcement officer to commit that crime, he is the victim of an unlawful entrapment with respect to that particular crime, and the law as a matter of policy forbids his conviction in such a case. . . .
>
> "If you find with respect to any defendant in this case that the design or purpose to violate the Internal Revenue Laws of the United States in regard to the manufacture or possession of non-tax paid whiskey as charged in the various counts of the indictment originated with some federal law enforcement officer, and that such federal law enforcement officer

also treats entrapment as a single-element defense. *See Robinson* v. *United States*, 366 F.2d 575 (10th

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implanted into the mind of an otherwise innocent defendant the purpose or the disposition to commit the alleged offense in order that he might be prosecuted, and that a defendant thus committed the offense charged as a result of such inducement or persuasion on the part of the Government agent, or if you have a reasonable doubt about these matters, then as to such defendant as to whom you so find, or as to whom you have reasonable doubt, the law does not permit a conviction to be had, and your verdict should be that of not guilty as to that defendant, or as to those defendants." *Id.* at 1161-1162.

In *Cross* v. *United States*, 347 F.2d 327 (8th Cir. 1965), the Court approved the following instructions:

> "Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.
>
> "On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but is lawful entrapment.
>
> "If the jury should find from the evidence that, before anything at all occurred respecting the alleged offenses involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment.
>
> "If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because she was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person and the defense of unlawful entrapment is a good defense, and the jury should acquit the accused." *Id.* at 329, n. 1.

That instruction, according to the Eighth Circuit, "correctly states the law of entrapment." *Id.* at 332. See also *Marbs* v. *United States*, 250 F.2d 514 (8th Cir. 1958), *cert. denied, sub nom. Sarkis* v. *United States*, 356 U.S. 919 (1958).

Cir. 1966); *Lucas* v. *United States*, 355 F.2d 245 (10th Cir. 1966).

The Ninth Circuit has rejected the Second Circuit formulation. Under the rule there prevailing, the trial judge must first determine whether an entrapment issue truly exists in the particular case before him. "The issue having appeared, it becomes the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense." The instruction submitted to the jury in such a case should not refer to "any burden whatsoever" on the defendant. *Notaro* v. *United States*, 363 F.2d 169, 175 (9th Cir. 1966). See also *Pratti* v. *United States*, 389 F.2d 660 (1968).

Finally, the District of Columbia Circuit has questioned and apparently rejected the Second Circuit formulation. In *Johnson* v. *United States*, 317 F.2d 127 (1963), that Court stated that "for purposes of instructing the jury it is better not to speak in terms of the defendant having the burden. Whenever the defense [of entrapment] is asserted on evidence which gives rise to a factual issue of inducement by the government an instruction on entrapment should be given if requested, regardless of the source from which the evidence of such inducement arises." *Id.* at 129, n. 2.

So far as counsel has been able to ascertain, only the Seventh Circuit has anything like kind words for the Second Circuit formulation—and those words are not really in point. See *United States* v. *Landry*, 257 F.2d 425, 429 (7th Cir. 1958).

II. The Instruction Approved in This Case Conflicts With the Requirements of the Due Process Clause and the Decision of This Court in In Re Winship.

The decision below not only conflicts with the law of virtually every other circuit, it violates a basic constitutional principle of criminal law.

It has long been true in the Federal criminal system that the government must prove each and every element of the crime "beyond a reasonable doubt." Recently, this Court concluded that the requirement is not merely one of custom and tradition, but is in fact founded on the Constitution itself. See *In re Winship*, 397 U.S. 358 (1970).

Where defenses are involved, the rule is different, but only slightly. The government need not in every trial disprove every conceivable defense: a particular defense is raised and need be negatived only when some evidence indicating the validity of that defense is adduced. For example, as to insanity: the issue is raised only when some credible evidence that the defendant lacked the mental capacity to commit the crime charged is produced. Once such evidence appears, the government must prove beyond a reasonable doubt that the defendant was sane. In such cases the presumption of sanity has been questioned, and the government is put to the task of proving beyond a reasonable doubt that he in fact possessed the necessary intent. See *Davis* v. *United States*, 160 U.S. 469, 484-88 (1895).

Similarly, once the issue of entrapment is raised, the question is whether the defendant possessed the guilty state of mind necessary to commit the crime charged. The essence of the entrapment defense is

that the conduct charged was not the free, voluntary, and self-initiated activity of the defendant, but was, rather, the product of government design. Once the defense is properly raised, the burden is on the government to prove beyond a reasonable doubt that the defendant was not coerced by the government into committing the crime but was in fact a willing and independent participant in the activities.

The panel below rejected this argument with a brief statement that the defense of entrapment "does not negative any of the essential elements of the crime" (App. 7a). The panel's sole authority for this conclusion were Second Circuit cases and the Final Report of the National Commission on Reform of Federal Criminal Laws. Petitioners respectfully submit that the Second Circuit again erred in this conclusion.

Freedom from entrapment is an essential element of the prosecution's case. If the defendant was entrapped he did not commit a crime. He is no more guilty of criminal activity than an individual who the jury concludes did not in fact do the acts charged by the government.

III. The Decision Below Deprives Petitioners of a Trial According to Law and Conflicts With This Court's Decisions on Prospective-Only Adjudication.

Although the Court of Appeals concluded that the bifurcated entrapment charge given in this case was not "fatally defective" the panel below went on to hold that the charge was also not acceptable. Accepting the validity of petitioners' arguments and attempting to resolve the conflict with other circuits, the Court stated that—in the future—trial courts in the Second Circuit should "use an entrapment charge that does

not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed upon two *different* parties" (App. 11a). Thus, the instruction given by the District Court in this case is precisely the form of instruction which the Second Circuit has held should not be used in the future.[5]

In effect, the Second Circuit concluded that the charge in this case was erroneous but since that conclusion constituted some departure from precedent in the circuit, the panel decided to apply the rule only in future cases.[6]

Petitioners respectfully submit that this conclusion ignored controlling decisions of this Court on prospective-only adjudication.

Beginning with *Linkletter* v. *Walker*, 381 U.S. 618 (1965), this Court has established the validity of "prospective-only" adjudication. In essence, the principle allows federal courts to depart from prior decisions without necessarily applying the new deci-

[5] Interestingly, the Court of Appeals in its opinion referred to the trial court's instruction as a "*then* correct exposition of the entrapment defense." (App. 12a) (emphasis added).

[6] It is not possible to interpret the panel's decision as a conclusion that the error was a "harmless" one. On appeal the government had urged affirmance, relying in part on the contention that any error in the entrapment charge was "harmless beyond a reasonable doubt." Gov. Br. on Appeal at 15. Petitioners urged below that any error in the entrapment instructions could not be considered "harmless." App. Br. at 31; App. Reply Memo. at 4-5. The Court of Appeals, in its written opinion, pointedly did not rely on any "harmless error" theory. Furthermore, in their petition for rehearing, petitioners requested the court to state clearly whether it was relying on "harmless error." Pet. for Rehearing at 5. The Court of Appeals declined to do so. In these circumstances, petitioners respectfully submit, the decision below cannot be defended by a "harmless error" analysis.

sion to cases tried before the decision date. But the decision to limit a new decision's retroactive application is not subject to unprincipled invocation. Rather, definite guidelines exist for deciding whether a new decision may be given prospective-only application.

The first principle of this Court's rulings is that a new decision must *always* be applied as the controlling law in the case which announces the new decision. As the Court stated in *Stovall* v. *Denno*, 388 U.S. 293 (1967):

> "Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying [the benefits of a new decision to the defendant in the case announcing that decision]. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Footnotes omitted.) *Id.* at 301.

In effect the Court of Appeals has in this case deprived petitioners of a trial according to due process of law. While the precise limits of that phrase may be unclear, it is certain that the heart of due process is "the rule of law." Due process requires that a trial be conducted in accordance with "the law of the land." See *Murray's Lessee* v. *Hoboken Land and Improvement Company*, 18 How. 272, 276 (1855); *Twining* v.

New Jersey, 211 U.S. 78, 100-101 (1908); *In re Winship, supra*, at 378-84 (Mr. Justice Black, dissenting). In this case the Second Circuit apparently felt that the law of the land does not support an entrapment instruction requiring the defendant to prove government initiation of the criminal activity. Quite clearly District Courts in the Second Circuit should not—in the future—employ such an instruction. Petitioners would, of course, agree with the Second Circuit's conclusion that the charge given in this case was erroneous and should not be used in future cases. However, if the charge was an incorrect statement of the law with respect to future trials, then it was no less incorrect in this very trial. The trial court incorrectly stated the law to the jury. This error tainted the jury's deliberations. The convictions resulting from these erroneous instructions should therefore be reversed.

CONCLUSION

For the foregoing reasons, petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAY H. TOPKIS
Attorney for Petitioners
345 Park Avenue
New York, New York 10022

Of Counsel:

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1775 K Street, N. W.
Washington, D. C. 20006

APPENDIX

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1031—September Term, 1970

(Argued July 1, 1971 Decided October 28, 1971)

Docket No. 71-1392

UNITED STATES OF AMERICA, *Appellee*,

—against—

IRVING BRAVER and MORTON LEHRER, *Defendants-Appellants*.

Before:

FEINBERG and MANSFIELD, *Circuit Judges*,
and BARTELS, *District Judge*.*

Appeal from conviction for bribery of government official and conspiracy to bribe, 18 U.S.C. §§ 201(b), 371, after jury trial in United States District Court for the Southern District of New York, Lloyd E. MacMahon, *J.* On appeal attacking charge on entrapment and failure to give continuance.

Affirmed.

JAY H. TOPKIS, New York, N. Y. (Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison; Kenneth C. Bass, III, Gary N. Jacobs, on the brief), *for Defendants-Appellants*.

RUDOLPH W. GIULIANI, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Jon A. Sale, Assistant United States Attorney, on the brief), *for Appellee*.

* Of the Eastern District of New York, sitting by designation.

FEINBERG, *Circuit Judge:*

Irving Braver and Morton Lehrer appeal from a judgment of conviction, entered after a trial in the United States District Court for the Southern District of New York before Lloyd F. MacMahon, *J.*, and a jury. Both were convicted on two counts,[1] bribing a government official in violation of 18 U.S.C. § 201(b), and conspiracy to bribe in violation of 18 U.S.C. § 371. Each was sentenced on the conspiracy count to six months imprisonment and a $10,000 fine and on the substantive count to a concurrent six month sentence and a $20,000 fine. Appellants are presently at liberty on their own recognizance. On appeal, they challenge the charge given by the trial judge on entrapment and his failure to grant a continuance on the last day of trial.

The facts of this case, as could have been found by the jury, arose from the activities of Harold Wenig, an undercover agent of the Internal Revenue Service (IRS). At the time in question, Wenig had posed as a corruptible IRS inspector.[2] In June 1967, Wenig told an IRS agent, Sidney Romanoff,[3] that the IRS was investigating the defendants' accounting firm and inquired whether Romanoff knew Braver or Lehrer. Romanoff, who had "moonlighted" for

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[1] Originally there were three counts. The third, charging the offer of an unlawful gratuity in violation of 18 U.S.C. § 201(f), was dismissed by the district court with the consent of the Government.

[2] For other results of Wenig's role, see *United States* v. *Lewis*, slip op. 4619 (2d Cir., Aug. 13, 1971); *United States* v. *Greenberg*, 444 F.2d 369 (2d Cir., 1971); *United States* v. *Viviano*, 437 F.2d 295 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971); *United States* v. *Weiser*, 428 F.2d 932 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).

[3] Before the June 1967 meeting, Romanoff had paid Wenig $200 for information concerning an IRS investigation of Romanoff. In 1968, he resigned from the IRS and subsequently pleaded guilty to an indictment charging conspiracy to bribe. At the time of trial, Romanoff had not yet been sentenced.

the firm, said that he did. Wenig then informed him that information concerning the investigation of the firm would be available for a price. During the early part of July Romanoff relayed the message to the defendants and, after some hesitation, Braver indicated that they would purchase the information for $500 although they were not sure it would have any value to them.

On July 13, Romanoff met Wenig in Manhattan where Romanoff copied information pertaining to the investigation of defendants' firm that Wenig read to him. Romanoff paid Wenig $500 in cash for this information and explained that he was advancing the money for the defendants. Wenig then offered to sell for $1,000 additional information about proposed grand jury questions. Immediately after this meeting, Romanoff delivered the information to Lehrer and asked if the defendants would be interested in the grand jury questions. Lehrer said that he would think about it. Approximately one week later Braver visited Romanoff at his home and reimbursed him for the $500 paid to Wenig.

On July 20, Wenig informed Romanoff that he would be interviewing clients of defendants' firm and Romanoff requested the list of the taxpayers. When questioned by Romanoff, Lehrer expressed no interest in the grand jury questions but told Romanoff that, as part of the $500 already paid, he and Braver were entitled to the list of the taxpayers. Romanoff again requested the list as a personal favor from Wenig and, on August 4, Wenig delivered it. A few days later Romanoff gave the list to Braver. There was no further exchange of money and the defendants never met Wenig.

I

Appellants' central argument concerns the district court's charge on entrapment. That charge, quoted in the margin,[4]

[4] The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government. That is, did the government

bifurcated the defense of entrapment into two elements, inducement and propensity. The judge instructed the jury that the defendants had the burden of proving inducement by a fair preponderance of the evidence and that the Government had to prove propensity beyond a reasonable doubt. Appellants recognize that this analysis of the entrapment defense is based upon Judge Learned Hand's opinion in *United States* v. *Sherman*, 200 F.2d 880 (2d Cir. 1952).[5] However, arguing that "This Court has never approved instructions modeled on *Sherman*,"[6] appellants urge us to reconsider that approach in light of the First Circuit decision in *Kadis* v. *United States*, 373 F.2d 370 (1967). Essentially appellants argue that dividing entrapment into two issues and placing the burden on the defendant to prove inducement is error because it conflicts with the constitu-

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initiate the criminal transaction? On this issue the defendant has the burden of proof. He does not have to prove it beyond a reasonable doubt but he must prove it by a fair preponderance of the evidence. That is, he must satisfy you that it is more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no entrapment, but if you do find such inducement then you must consider the second issue.

The second issue is whether the defendant was ready and willing to commit the crime without persuasion. This is sometimes expressed as an issue of whether he had a propensity to commit the crime. On this issue the government has the burden of proof and it must prove it beyond a reasonable doubt. . . .

[5] [I]n [entrapment] cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it. 200 F.2d at 882-83. Ultimately the Supreme Court held that the defendant had been entrapped as a matter of law. *Sherman* v. *United States*, 356 U.S. 369 (1958).

[6] Appellants' Brief at 14.

tionally mandated presumption of innocence and because it is unduly prejudicial.[7]

Appellants point out that the *Sherman* decision reversed the trial court for errors in the instructions given there and did not specifically approve the charge used in this case. But it is late in the day to argue that this court has not since approved that charge. A few weeks before this case was argued, we said in *United States* v. *Greenberg*, 444 F.2d 369, 371 (2d Cir. 1971), that "This circuit adheres to the bifurcated analysis of entrapment defined in *United States* v. *Sherman*. . . ." Even more recently, in *United States* v. *Nieves*, slip op. 4939, 4942 (2d Cir., Aug. 31, 1971), we specifically relied on the *Sherman* inducement-propensity analysis.

Moreover, we believe that this circuit has approved a defendant's burden of proof as charged in this case. Judge Hand did not specifically define the quantum of proof in *Sherman* and only stated that on the issue of inducement "the accused had the burden." 200 F.2d at 882. Arguably, Judge Hand may have been referring only to the burden of coming forward with evidence, rather than a burden of persuasion. See C. McCormick, Law of Evidence §§ 306, 307 (1954). But such an argument does not amount to very much. In the passage quoted in note 5 *supra*, Judge Hand contrasted the defendant's "burden" with that of the Gov-

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[7] At trial, defendants not only raised the entrapment defense but also testified that they had not paid any bribe. This raises the problem of inconsistent defenses. However, the district court allowed both, and the Government does not raise the issue in this court. In these circumstances we do not consider whether a defendant has the right "both to deny the transaction and 'to urge that if the jury believed it did occur, the government's evidence as to how it occurred indicated entrapment.' [*Hansford* v. *United States*, 303 F.2d 249, 251 (D.C. Cir. 1962).]" *United States* v. *Alford*, 373 F.2d 508, 509 (2d Cir.), *cert. denied*, 387 U.S. 937 (1967); see also *United States* v. *Bishop*, 367 F.2d 806, 809 & n. 4 (2d Cir. 1966).

ernment. Almost immediately following that sentence, the opinion stated that on the inducement "issue [defendant] had the affirmative." Id. at 883. Then the opinion said that the "prosecution had the burden upon the issue of [propensity], it had to satisfy the jury." Id. From this it is apparent that a defendant's burden of proof must be at least the "preponderance" or "more-likely-than-not" standard. In *United States* v. *Thomas*, 351 F.2d 538 (2d Cir. 1965), this court indicated that the burden was by a "preponderance of the evidence," and the opinions in *United States* v. *Guidice*, 425 F.2d 886, 889-91 (2d Cir.), *cert. denied sub nom.*, *Fontana* v. *United States*, 400 U.S. 842 (1970), and *United States* v. *Bishop*, 367 F.2d 806, 809 n.3 (2d Cir. 1966), clearly assume that the defendant has to meet that standard of proof. See also *United States* v. *Lewis*, slip op. 4619, 4627 (2d Cir., Aug. 13, 1971); *United States* v. *Weiser*, 428 F.2d 932, 934 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971). Nothing said in *United States* v. *Cohen*, 431 F.2d 830 (2d Cir. 1970), *United States* v. *Henry*, 417 F.2d 267 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970), or *United States* v. *Pugliese*, 346 F.2d 861 (2d Cir. 1965), indicates the contrary. At most those opinions indicate that a defendant's burden may be reconsidered in an appropriate case or that, to meet his burden, a defendant need prove no more than "the government agent initiated the payment." *United States* v. *Cohen*, 431 F.2d 830, 832 n.2 (2d Cir. 1970).

Appellants also argue that instructions based upon *Sherman* are constitutionally deficient and prejudicially confusing. As to the former, the claim is that placing upon the defendant the burden of proving inducement denies him due process. *In re Winship*, 397 U.S. 358, 364 (1970), relied upon by appellants, held that:

> [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Without discussing the various rationales for the entrapment defense,[8] it is enough to say that the law of this circuit is that the defense "does not negative any of the essential elements of the crime." *United States* v. *Greenberg*, 444 F.2d 369, 372 (2d Cir. 1971). See also *United States* v. *Riley*, 363 F.2d 955 (2d Cir. 1966); Final Report of the National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 702 (1971) [Proposed Federal Criminal Code].

As to the alleged confusion created by the *Sherman* instructions, appellants have a number of arguments. First, they claim that a lay jury cannot really distinguish in the same case between proof beyond a reasonable doubt and proof by a preponderance of the evidence. Second, they say that the central issue in entrapment cases is "whether the crime was the product of government activity—or the response of a ready and willing individual merely awaiting an opportunity to commit the crime" and that considering "the initiation of the criminal activity apart from the defendants' willingness to engage" in it is "an unrealistic separation."[9] Finally, they claim that on the facts of this case, where the evidence of government initiation was both sufficient under *United States* v. *Riley*, 363 F.2d 955 (2d Cir. 1966), and uncontradicted, submitting the issue to the jury was error because this gave the jury the impression that the evidence before it was insufficient to prove inducement.

Taking the last of these arguments first, we do not agree that because the evidence was so overwhelmingly against

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[8] See, *e.g.*, *Sherman* v. *United States*, 356 U.S. 369 (1958); *Sorrells* v. *United States*, 287 U.S. 435 (1932); *United States* v. *Dyker*, 388 F.2d 430, 432 n. 4 (2d Cir. 1968); *United States* v. *Bishop*, 367 F.2d 806, 808 n. 2 (2d Cir. 1966); 1 Working Papers of the National Commission on Reform of the Federal Criminal Laws 314-17 (1970) [1 Working Papers].

[9] Appellants' Brief at 28.

the Government on the issue of inducement, it was prejudicial error to submit the issue to the jury at all. The basic premise that the submission itself indicated to the jury that there was not enough evidence to prove inducement is logically unsound. One might argue with equal force that submission to the jury implies just the opposite. Moreover, no clear request was made to the judge to withdraw the issue from jury consideration, nor can we conceive that the jury on this record found that defendants had not established initiation. While the judge might properly have told the jury that government initiation of the crime had been proved, his failure to do so was not reversible error.

The claim that the true focus should be on a single issue is more substantial. This was the emphasis of the First Circuit in *Kadis* v. *United States*, 373 F.2d 370 (1967), where the court said, 373 F.2d at 373-74:

> We will no longer bifurcate entrapment into sub-issues of inducement and predisposition. . . . [W]e will look, singly, at the ultimate question of entrapment. If the defendant shows, through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness.

See also *United States* v. *DeVore*, 423 F.2d 1069 (4th Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). However, as this formulation indicates, sub-issues still remain. Evidence of "solicitation" is not enough; there must also be evidence "tending to show unreadiness." Presumably evidence of the latter without the former would also not suffice for a defendant. We realize that under the *Kadis* opinion the analysis of these sub-issues apparently remains only for the court, with the jury getting a general instruction to decide whether the Government had met its burden "to show that the defendant was not in fact corrupted by the

government agent.'"[10] 373 F.2d at 374. But, as will be seen below, we think that an alternative formulation will provide enough of the unitary emphasis without departing too far from our precedents.

Finally, we do not agree that there is prejudicial error because the jury must use two different tests of burden of proof. Issues upon which the Government's burden of proof is by a preponderance of evidence only[11] or on which the defendant has the burden of proof[12] are not unknown in the criminal law. If defendants' proposition were sound, there could be no valid convictions in such instances. Indeed, the specific suggestion of § 702 of the Proposed Federal Criminal Code, see note 10 *supra*, is to place upon the defendant the burden of proof as to entrapment by a preponderance of the evidence, and the notes to the section

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[10] It should be noted that this is still a subjective test of entrapment because it focuses not only on the governmental activities but also on the state of mind of the accused. *Cf. United States* v. *Morrison*, 348 F.2d 1003, 1004 (2d Cir.), *cert. denied*, 382 U.S. 905 (1965). An objective test, focusing solely on the governmental activities and based primarily on the concurring opinions of Justice Roberts in *Sorrells* v. *United States*, 287 U.S. 435, 453 (1932), and of Justice Frankfurter in *Sherman* v. *United States*, 356 U.S. 369, 378 (1958), has been suggested in the Proposed Federal Criminal Code. Under that proposal, objective entrapment would be an affirmative defense with the defendant having the burden of proof by a preponderance of the evidence, but proof of prior criminal record to show propensity would apparently be eliminated. Proposed Federal Criminal Code § 702; 1 Working Papers 303-28. Whatever the merits of this approach, we have not been asked to reconsider our use of a subjective test.

[11] See, *e.g.*, the rule in some other circuits on the issue of venue. *Hill* v. *United States*, 284 F.2d 754, 755 (9th Cir.), *cert. denied*, 365 U.S. 873 (1961) (Government must prove by preponderance of evidence); 1 Working Papers 12-13.

[12] See, *e.g.*, 15 U.S.C. § 80a-48; N.Y. Penal Law § 25.00(2) (McKinney 1967); See also *Leland* v. *Oregon*, 343 U.S. 790, 800 (1952); 1 Working Papers 17-19.

indicate the possibility of jury trial of the issue. While nothing in this opinion should be viewed as approval of that proposal, it at least suggests that one scholarly group does not regard the use of two burdens of proof in the same criminal case as hopelessly confusing to a jury.

This does not mean that we are averse to changing the entrapment charge if there are good reasons for doing so. It does mean that we reject the proposition that the *Sherman* charge on entrapment has been fatally defective. However, it is evidence from the record in prior cases in this court that some of the district court judges in this circuit do not always follow in every detail the charge based upon *Sherman*. See, *e.g.*, *United States* v. *Berger*, 433 F.2d 680 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971). In that case, 433 F.2d at 684, we noted approval of a charge that defendant had to:

> [A]dduce some evidence that a government agent by initiating the illegal conduct himself induced the defendant to commit the offense. If you find that the defendant . . . has adduced such evidence then the government must prove beyond a reasonable doubt that the inducement was not the cause of the crime, that the defendant . . . was ready and willing to commit the offense.

In the case before us the Government requested a similar charge, which would have required only that the defendants adduce some evidence on the inducement issue. And we are told that such a request is now frequently made by the Government in cases tried in the Southern District. In addition, we are aware that the definition of inducement now in effect in this circuit requires so little evidence to satisfy the defendant's burden of proof, as it has been phrased up to now, that production of "some evidence" of government initiation almost always satisfies it. Accordingly, we agree that a simplification of the charge on this issue is appropriate.

In light of all of this, we suggest that it would be preferable for the district courts of this circuit to use an entrapment charge that does not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed upon two different parties. While we do not specifically define this preferable charge, we suggest that there be no reference to "burden" or "burden of proof" or "preponderance of evidence" in describing a defendant's obligation. In explaining the burden of proof on entrapment, it will be enough to tell the jury that if it finds some evidence of government initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime. The language quoted from *United States* v. *Berger*, *supra*, would obviously be appropriate.

One further comment is necessary. In *United States* v. *Riley*, 363 F.2d 955 (2d Cir. 1966), we held that the issue of entrapment need not be submitted to the jury when, even if there is evidence of inducement, there is uncontroverted evidence of the defendant's propensity to commit the crime. Nothing in this opinion is meant to change that rule.

II

Appellants raise two other claims of error. First, they contend that a portion of the district court's charge explaining the rationale of the entrapment defense in essence told the jury that the government activities in this case were proper. Second, they claim that the district court abused its discretion by not granting a continuance at the end of the Government's case.

We reproduce in the margin the portion of the charge objected to by appellants.[13] We do not agree that it re-

[13] The defendant asserts the defense of entrapment. The defense of entrapment is based upon the policy that law enforcement agencies cannot manufacture crime. They cannot tempt innocent people into committing a crime in order to prosecute them. But

moved from the jury the factual question of entrapment. The district court merely explained the policy behind the entrapment defense and clarified the proper relationship of that defense with such law enforcement stratagems as undercover investigation and informers. Under present authority, use of the latter techniques is not per se improper. *Sherman v. United States*, 356 U.S. 369, 372 (1958). Moreover, the explanation was immediately followed by the district court's then correct exposition of the entrapment defense.[11]

As explained above, after the entrapment issue had been raised by evidence of government initiation of the crime, the prosecution had the burden to prove beyond a reasonable doubt that the accused had the propensity to commit the crime charged. In this case, the Government amply met that burden on Thursday, January 28, 1971, through the testimony of two witnesses: Mantell, a client of defendants' firm, and Fanella, an IRS employee. The former testified that he had paid appellants extra fees to ensure special handling of his tax returns by the IRS. The latter testified that he had received bribes from appellants. Clearly, the issue of propensity was important, and appellants' counsel timely requested a continuance on the grounds of surprise in order to counter

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a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal. Law enforcement agencies often use undercover investigations and informants in attempting to enforce law. Such methods are not in any way forbidden by law. Stealth and strategy are often necessary weapons in the detection and prosecution of crime. Whether or not you personally agree with the policy of using such methods is not an issue. Whether or not you agree with the policy of using co-conspirators like Romanoff or former criminals like Fanella, it is proper and the government must take such witnesses as there are to a transaction. It often has no choice and were it not for the use of such people, such methods, many crimes would go undetected and unprosecuted.

[11] Quoted at note 4 *supra*.

the Government's testimony. This was denied, and appellants argue to us that the denial was an abuse of discretion.

Obviously, the trial judge must have discretion to run his trials both to avoid undue delay and to protect the interests of the accused. Because appellants were on notice as to the substance of the propensity testimony and as to Judge MacMahon's desire to complete testimony on Thursday, January 28, we believe that the district court's denial was within its discretion. It is true that appellants never learned the actual names of Mantell and Fanella before they testified, but the substance of their testimony was known before trial. Appellants' counsel had listened to tapes of a conversation between Wenig and Romanoff in which Wenig discussed evidence in IRS files showing that some tax returns of defendants' clients bypassed normal audit procedures and that defendants had paid bribes to IRS employees. Indeed, Wenig testified to the same conversation at trial. Moreover, on Wednesday, January 27, the government counsel explicitly made an offer of proof that outlined the testimony of Mantell and Fanella. On the same day, Judge MacMahon made it clear that the taking of testimony should be completed the next day. Despite all of this, and despite the fact that propensity testimony was critical to an entrapment defense, appellants' counsel did not request the names of the government witnesses before they testified. Even now, appellants point to no fact that they were prevented from presenting.

The convictions are affirmed.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of October, one thousand nine hundred and seventy-one.

Present:

HON. WILFRED FEINBERG,

HON. WALTER R. MANSFIELD,
Circuit Judges

HON. JOHN R. BARTELS,
District Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

IRVING BRAVER AND MORTON LEHRER, *Defendants-Appellants*.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

[Filed October 28, 1971]

APPENDIX C.

Orders on Rehearing

No. 71-1392

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

IRVING BRAVER AND MORTON LEHRER, *Defendants-Appellants*.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ WILFRED FEINBERG
Wilfred Feinberg

/s/ WALTER R. MANSFIELD
Walter R. Mansfield

/s/ JOHN R. BARTELS
John R. Bartels

November 24, 1971

No. 71-1392

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

IRVING BRAVER AND MORTON LEHRER, *Defendants-Appellants*.

A petition for a rehearing containing a suggestion that the action be reheard in [*sic*] banc having been filed herein by counsel for the appellants and no active circuit judge having requested that a vote be taken on said suggestion;

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ HENRY J. FRIENDLY
Chief Judge

November 24, 1971